The defendant's solicitors then wrote their letter of 6th June in which it was denied that the defendant instructed the plaintiffs to stop work, although she admitted that she had constantly complained to the plaintiffs of the slow progress. The last paragraph of this letter stated as follows:—

"As your client has not recommenced work nor did he give any indication that he will continue the work my client has made other arrangements to complete the building."

The correspondence between the parties after 19th May, 1961 gives clear indication as to the disputes between the parties. Whatever other construction may be placed upon this correspondence, it seems clear that the plaintiffs had no intention of abandoning the contract. They suggested, and they were quite right in doing so, that there should be a proper agreement drawn up between the parties so as to avoid any future disputes. Here was an opportunity for the defendant to get a definite written contract as to the time within which the building should be completed. It was open to her to refuse to pay any more money notwithstanding the plaintiffs' allegations that she had agreed to pay $3,000 in respect of certain alterations to the original plans, but she had no right to make other arrangements to complete the building before the end of two weeks in which she had asked the plaintiffs to recommence work by her letter of 23rd May, 1961.

She has stated in her evidence that she was not prepared to enter into a proper contract with the plaintiffs and that she had made up her mind, whatever happened, that she was going to finish the work herself. She had made up her mind that way on 5th June, 1961. She had thus clearly made up her mind not to let the plaintiffs complete the building. She would have been entitled to do that had she waited for the period of her notice to expire, but in view of her attitude she was clearly in breach of contract. Moreover, this conduct on her part clearly shows that she herself was responsible for the stoppage of work. I therefore hold that the defendant wrongfully terminated the contract on 6th June, 1961. As the defendant prevented the whole of the work from being carried out, the plaintiffs have a remedy either on a *quantum meruit* for what they have done or by way of damages. They have elected to base their claim on *quantum meruit*, and on this they are entitled to succeed.

The main defence to the claim is that this was a lump sum or an entire contract which was abandoned after a part of the work had been done and that consequently on the authority of *Sumpter* v. *Hedges* [1] the plaintiffs have no right to sue on *quantum meruit*. The answer to that is that in the first place the plaintiffs did not abandon the work, and, in the second place, this was not an entire contract. An entire contract is one in which the entire completion of the work by the contractor is a condition precedent to payment. To my mind, a contract in respect of which progress payments are made from time to time is not an entire or lump sum contract. The payments which were made in this case have been referred to as advance payments, but there is evidence that they bore relation to the work done. The doctrine of *Sumpter* v. *Hedges* therefore, in my opinion, has no application to this case.

The defendant has set up a counterclaim in respect of the amount which she spent over and above the total amounts which she had paid to the plaintiffs for completing the building. On this she is not entitled to succeed because of the breach of contract on her part in not allowing the plaintiffs to complete the work.

As regards the plaintiffs' claim on *quantum meruit*, they have produced bills and receipts for a sum of $9,281.74 in respect of the cost of materials and labour charges, etc. The amount claimed is set out in their letters to the defendant of 11th May, 1961 and 24th June, 1961. The difference between the total of the receipts and the amount claimed represents services and office expenditure and a small margin of profit which a building contractor normally makes. In any event, the amount claimed has not been seriously challenged. The total value of the work done is estimated at $11,119, against which a sum of $9,000 has already been paid, leaving a balance of $2,119. I therefore allow judgment for the plaintiffs for the sum of $2,119 and dismiss the counterclaim. The defendant must also pay the plaintiffs' costs of the action as taxed.

Judgment for the plaintiffs.

Solicitors: *Skrine & Co.*; *S. Y. Chan.*

LIM CHUI LAI v. ZENO LIMITED

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) & Tan Ah Tah F.J.) June 1, 1964]

[K.L. — Federal Court Civil Appeal No. 84 of 1963]

Contract — Construction of culverts — Cancellation of contract — Bailee selling construction materials to 3rd party — Whether 3rd party acquires title — Bailee claiming materials to be partnership property — Contracts (Malay States) Ordinance, 1950, s. 193.

Sale of Goods — Bailee disposing off goods to 3rd party — Whether bailee can give good title — Sale of Goods (Malay States) Ordinance, 1957, s. 27.

Practice and Procedure — Point not pleaded or taken at trial — Whether can be entertained on appeal.

One T the chairman of the respondent company's board of directors entered into an agreement sometime in January 1961 with a contractor named A who had secured contracts from the Petaling Jaya Authority for construction of culverts under which the respondents were to provide A with all materials for his culverts and also the finance needed to carry out his contracts. The respondents then bought the materials for the project and

delivered them to the construction site. About the middle of June 1961 the respondents came to know that the Petaling Jaya Authority, after having some trouble with A, had cancelled his contract. The respondents then informed the Petaling Jaya Authority that the materials on the site belonged to them and also made attempts to sell them. In September 1961 the respondents discovered that the materials had been sold by A to the appellant for $14,000 of which A had received $7,000 in part payment. The respondents then commenced this action for conversion. The trial judge gave judgment for the respondents for the sum of $25,080.52 and costs. On appeal by the appellants it was contended that: (i) as the respondents caused the chattels to be delivered to A, he became the owner of the chattels and as such could pass a title in respect of the chattels to the appellant and (ii) the chattels were the property of a partnership between the respondents and A and as such A had power to dispose of the goods under section 28 of the Sale of Goods Ordinance.

Held: (1) A was merely the bailee and not the owner of the chattels at the time he sold them to the appellant; as he had no title to the chattels or authority to sell them he could not give the appellant any title;

(2) as the second contention was never mentioned in the pleadings or at the trial it should not be raised on appeal; further there was no evidence that A was a partner of the respondents.

Cases referred to:—

(1) *Farquharson Bros. & Co.* v. *C. King* [1902] A.C. 325.

(2) *The Owners of the ship "Tasmania" & The Owners of the Freight* v. *Smith & Owners of the ship "City of Corinth"*, 15 App. Cas. 223.

FEDERAL COURT.

R. H. V. Rintoul (*Kam Woon Wah* with him) for the appellant.

Chooi Mun Sou for the respondents.

Barakbah C.J. (Malaya): This is an appeal by the defendant against the decision of Ong J. who gave judgment for the plaintiff in the sum of $25,080.52 and costs.

The facts briefly are that in January 1961, the chairman of the plaintiff company's board of directors, Tahir Karim Loebis, entered into an agreement with a Malay contractor, Ahmad bin Haji Yacob who had secured contracts from Petaling Jaya Authority for construction of culverts. The plaintiff was to provide the said contractor with all materials to be used as required for his contracts and also the finance needed to carry out his contracts. The materials were only to be used for the contracts and nothing else. The plaintiff then bought the materials for the project from Lam Huat & Co. Ltd. i.e. steel bars, cement and small items which were set out in paragraph 3 of the statement of claim. These were delivered to the construction site in Jalan University.

About the middle of June 1961, the plaintiff came to know that the Petaling Jaya Authority, after having had trouble with Ahmad, had cancelled his contract. The plaintiff then informed the Petaling Jaya Authority that the materials on the site belonged to the company and also made attempts to sell them.

In September the plaintiff discovered that the materials had been sold by Ahmad to the defendant for $14,000 of which Ahmad had received $7,000 in part payment. After failure to make an amicable settlement with the defendant, the plaintiff commenced this action for conversion.

Mr. Rintoul for the appellant stated that he was not submitting any arguments on grounds 2 and 3 of the memorandum of appeal and proceeded to deal with ground 1 in which he stated that since the respondent company caused the chattels, the subject matter of this suit, to be delivered to the said Ahmad and the price thereof debited to him, he, the said Ahmad, became the owner of the chattels and therefore could pass a title in respect of the chattels to the appellant. He also maintained that the said Ahmad was not a bailee of the said chattels. In my opinion, the delivery of the chattels to the said Ahmad did not constitute him the owner. They were delivered to the site by the plaintiff company to be used for the purpose of the contracts only and nothing else viz. for construction of culverts for Petaling Jaya Authority. The respondent company bought the materials from Lam Huat & Co. who delivered them to the site. The agreement between the respondent company and the said Ahmad was that all payments received by Ahmad from the Petaling Jaya Authority should be immediately paid over to the company which would deduct the cost of materials and any finance provided by the company plus 5% as its share of profit and the balance would be paid to Ahmad. In my view, Ahmad was merely the bailee, not the owner of the chattels at the time he sold them to the appellant. He had no title to the chattels or authority to sell them and therefore he could not give the appellant any title. Section 27 of the Sale of Goods (Malay States) Ordinance, 1957, states:

> "Subject to the provisions of this Ordinance and any other law for the time being in force, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell:...."

See the case of *Farquharson Brothers & Co.* v. *C. King.*[1] It is true that Ahmad insured the goods but there is nothing inconsistent with the bailee doing so.

With regard to ground 4 which states that the chattels were the property of a partnership between respondents and Ahmad and that Ahmad as partner had power of disposing the chattels under section 28 of the Sale of Goods Ordinance, 1957, it was never mentioned in the pleadings or at the trial and in my view it should not be raised

now. Ahmad did not say in his evidence that he was a partner. He merely said that the goods were sold to him. Lord Herschell in *The Owners of the Ship "Tasmania" and the Owners of the Freight* v. *Smith and Owners of ship "City of Corinth"*,[2] at page 225 said

"My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witness are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.

It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box."

According to section 193 of the Contracts (Malay States) Ordinance, 1950,

"A loan to a person engaged, or about to engage, in any trade or undertaking, upon a contract with such person that the lender shall receive interest at a rate varying with the profits, or that he shall receive a share of the profits, does not, of itself, constitute the lender a partner, or render him responsible as such."

Here there was no evidence to show that he was a partner. I therefore find there is no merit in this ground of appeal.

I do not think that I should disturb the learned judge's finding as to damages as in his judgment, he had found "there is no dispute by the defendant as to the quantity, value or delivery of all these construction materials."

For the above reasons, I would dismiss the appeal with costs.

Thomson L.P. and **Tan Ah Tah F.J.** concurred.

Appeal dismissed.

Solicitors: *Kam Woon Wah & Co.; Chooi Mun Sou.*

TAN CHIN KENG v. PUBLIC PROSECUTOR

[A.Cr.J. (Ismail Khan J.) June 19, 1964]

[Malacca — Criminal Appeal No. 1 of 1964]

Criminal Procedure — Charge — Attempted extortion — Framing of, in.

Penal Code, ss. 384, 385 and 511 — Attempted extortion — Charge — Framing of.

Penal Code, s. 34 — Act committed in pursuance of a common intention — Necessity for prosecution to specify reliance on section 34.

The appellant and another were charged "That you on 26.11.63 at about 11.30 a.m. at the Goh Lian Huat Coffee Shop, Bunga Raya Road, Malacca, in the State of Malacca did attempt to extort money a sum of $720.00 from one Wong Kak Sin by threatening to put the said Wong Kak Sin in fear of injury to wit, that you will smash up his shop if the said Wong Kak Sin did not pay up the demand and that you have thereby committed an offence punishable under section 385 of the Penal Code Cap. 45," and each convicted and sentenced to one year's imprisonment and six strokes of the rattan. On appeal against conviction and sentence it was contended that (i) the charge was bad for duplicity as it was not clear whether the appellant was charged with an offence of attempted extortion under section 384 of the Penal Code read with section 511 thereof or with an offence of putting a person in fear of injury under section 385, (ii) where the prosecution invokes the aid of section 34 it is necessary to frame a charge under that section.

Held: (1) though the charge was not happily framed, it was possible to make out what it alleged, namely, that the appellant and another put the complainant in fear of injury in order to the committing of extortion; there was therefore no question of the duplicity of the charge;

(2) there was nothing in the charge to indicate to the appellant with sufficient clarity that what the prosecution proposed to establish against him was not that he demanded any money from or threatened the complainant with injury but that he and others were acting together with a common intention to put the complainant in fear of injury with a view to committing the extortion and that in furtherance of the common intention of all of them the complainant was put in such fear.

Per Ismail Khan J.: "Where the charge is one of attempted extortion it should be framed under section 385 of the Penal Code and not under section 384 read with section 511."

Case referred to:—

(1) *Osman bin Abdullah* v. *Public Prosecutor* [1958] M.L.J. 12, 16.

CRIMINAL APPEAL.

H. B. Ball for the appellant.

Abdul Razak bin Dato' Abu Samah (Deputy Public Prosecutor) for the respondent.

Ismail Khan J.: The appellant and one Tan Heng Hong (hereinafter called the 1st accused) were charged as follows:—

"That you on 26.11.63 at about 11.30 a.m. at the Goh Lian Huat Coffee Shop, Bunga Raya Road, Malacca in the State of Malacca did attempt to extort money a sum of $720.00 from one Wong Kak Sin by threatening to put the said Wong Kak Sin in fear of injury to wit, that you will smash up his shop if the said Wong Kak Sin did not pay up the demand and that you have thereby committed an offence punishable under section 385 of the Penal Code Cap. 45."

According to the prosecution, on 25th November, 1963, two young male Chinese, one of whom was the 1st accused, called on the complainant P.W.1 and his father P.W.2 at their shop No. 15, Bunga Raya, Malacca. They said they were members of a certain gang and asked him for $72 failing which they threatened to burn the shop. The complainant was frightened as a result of this threat. At about 6 p.m. the same day P.W.2 received a phone call instructing him to send the money to a coffee shop in Heeren Street. P.W.2 told the complainant about this and the latter then lodged a report. He went